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IN THE

Supreme Court of the United States

NOVEMBER TERM, 1976

No. 76-943

ALBERT T. CANNADY,

Petitioner,

v.

NORTH CAROLINA WILDLIFE RESOURCES COMMISSION And Commissioners, ROSCOE D. SANDLIN, W. K. ANDERSON, WILLIAM C. BOYD, WALLACE E. CASE, ROY A. HUNEYCUTT, HENRY E. MOORE, JAY WAGGONER, DEWEY E. WELLS, and B. E. WILSON,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Court of Appeals of the State of North Carolina is reported at 30 NC App. 247. The Judgment of the Supreme Court of North Carolina was entered on October 11, 1976.

JURISDICTION

The jurisdiction of the Court has been evoked under 28 USC, Section 1258.

QUESTIONS PRESENTED

1. Is Chapter 56 of the 1975 Session Laws, codified as Article 2, Chapter 19A of the General Statutes of North Carolina, unconstitutional because:

(a) It provides for the taking of the property of the petitioner without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

(b) It provides for the taking of the property of the petitioner without due process of law?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment Five, Constitution of the United States:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

2. Amendment Fourteen, Section 1:

All persons born or naturalized in the United States, and the subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

3. General Statutes of North Carolina, Chapter 19A, Article 2:

Protection of Black Bears.

§ 19A-10. Unlawful to buy, sell or enclose (except as provided) black bear.– Except as otherwise provided in applicable statutes, it shall be unlawful for any person to buy or sell black bears or for any person, firm or corporation to possess or keep any black bear *(Ursus americanus)* in any enclosure, pen, cage, or other place or means of captivity except as hereinafter provided. (1975, c. 56, s. 1.)

Editor's Note.–Session Laws 1975, c. 56, s. 7, provides that the act shall become effective July 1, 1975.

§ 19A-11. Inapplicable to bona fide zoos, etc. – The provisions of this Article shall not apply to bona fide zoos which are operated by federal, State, or local governmental agencies, or to educational institutions in which black bears are kept or exhibited as part of a bona fide course of training or research in the natural sciences, or to black bears held without caging under conditions simulating a natural habitat, the development of which is in accord with plans and specifications developed by the holder and approved by the Wildlife Resources Commission. (1975, c. 56, s. 2.)

§ **19A-12. Possession of black bear on July 1, 1975; surrender of bear; modification of facilities; forfeiture.** – Any person, firm or corporation in possession of a black bear on July 1, 1975, under an existing permit issued by the Wildlife Resources Commission, where the conditions under which such black bear is held are in violation of this Article, may immediately surrencer such black bear and such permit to the Wildlife Resources Commission which shall compensate such person, firm or corporation in the amount actually paid for such bear not to exceed the sum of one hundred dollars ($100.00) for any one bear. In lieu of surrendering such black bear and such permit, any such person, firm or corporation may give immediately written notice to the Wildlife Resources Commission that plans and specifications for facilities to hold such bear without caging under conditions simulating a natural habitat will be submitted to the Commission for approval within 30 days thereafter. In the event such plans and specifications are not submitted within the time thus limited, or they are disapproved by the Commission, or the facilities are not completed in accordance therewith within 60 days after approval by the Commission, continued possession of a black bear by such person, firm or corporation after any of such events shall constitute a violation of the provisions of this Article, and any such black bear shall be forfeited to the Wildlife Resources Commission without compensation. (1975, c. 56, s. 3.)

§ **19A-13. Violation of Article.** – Violation of the provisions of this Article shall constitute a misdemeanor punishable by a fine of not less than five hundred dollars ($500.00) or by imprisonment for not less than 90 days. (1975, c. 56, s. 4.)

§ **19A-14. Enforcement of Article.** – Law-enforcement officers of the Wildlife Resources Commission and all other peace officers are authorized and empowered to enforce the provisions of this Article. (1975, c. 56, s. 5.)

STATEMENT OF THE CASE

Chapter 19A, Article 2 of the North Carolina General Statutes, was enacted in 1975 by the North Carolina General Assembly and became effective July 1, 1975.

On June 16, 1975, the North Carolina Wildlife Resources Commission adopted a policy with respect to the holding of black bears. (Appendix A.) The plaintiff herein was notified by mail on June 27, 1975, of the enactment of Chapter 19A, Article 2, and sent a copy of the Commission's policy (Appendix B). The plaintiff did not answer the Commission's letter. On July 28, 1975, the Commission again wrote to the Plaintiff (Appendix C). The Plaintiff replied in a letter dated August 1, 1975 (Appendix D). The Commission replied to Plaintiff's August 1 letter dated August 4, 1975 (Appendix E).

On August 5, 1975, the Plaintiff instituted a civil action in the Superior Court of Craven County, North Carolina, against the Defendants herein seeking to have Chapter 19A, Article 2 declared unconstitutional and seeking injunctive relief. On August 6, 1975, the Defendants were temporarily restrained from removing a black bear from the Plaintiff's possession and said order was extended until further order of the Court of August 13, 1975. The Defendants herein, until this date, have not taken or attempted to take possession of the Plaintiff's black bear pursuant to an order issued by a North Carolina Superior Court Judge on November 30, 1976, pending action on Plaintiff's writ filed in this Court.

ARGUMENT

1. IS CHAPTER 56 OF THE 1975 SESSION LAWS, CODIFIED AS ARTICLE 2, CHAPTER 19A OF THE GENERAL STATUTES, UNCONSTITUTIONAL BECAUSE:

(a) IT PROVIDES FOR THE TAKING OF PROPERTY OF THE PLAINTIFF WITHOUT JUST COMPENSATION?

Article 2, Chapter 19A of the General Statutes of North Carolina does not violate the Constitution of the United States Amendment V by taking the Plaintiff's property without just compensation.

The Plaintiff contends that under Article 2 of Chapter 19A, and particularly G. S. 19A-12, he is not entitled to receive any compensation from the Wildlife Resources Commission for the black bear in question because he did not purchase the bear but received it as a gift. It is true that a literal reading of G. S. 19A-12 would appear to make the Plaintiff's contention correct. However, it is clear from the record in this case and particularly Appendix B and C that the Wildlife Commission would have paid the Plaintiff $100.00 for the bear had he been willing to surrender it.

The Defendant does not admit that there has been an attempted "taking" for a "public use" within the meaning of the Fifth Amendment of the United States Constitution.

"Neither wild animals nor any parts thereof are subject to private ownership except insofar as the State may choose to make them so" (citing cases). Similarly stated, such animals become the subject of private ownership only so far as the people, through their legislature, may elect to make them so, but within the provisions of such a statute, the individual is as

much protected in the enjoyment of his rights in this species of property as in any other under the law." (Citing cases) 3A CJS 478, Animals, Section 7. See also 4 Am. Jur. 2d, Animals, Section 14.

(b) IS CHAPTER 56 OF THE 1975 SESSION LAWS, CODIFIED AS ARTICLE 2, CHAPTER 19A OF THE GENERAL STATUTES, UNCONSTITUTIONAL BECAUSE IT PROVIDES FOR THE TAKING OF THE PROPERTY OF PLAINTIFF WITHOUT DUE PROCESS OF LAW?

Article 3 of Chapter 19A of the General Statutes does not violate Section 1 of the Fourteenth Amendment to the United States Constitution by taking the Plaintiff's property without due process of law.

The only testimony in the record as to the value of the black bear was that of the Plaintiff when he stated the bear "... is worth $200-250." This testimony was given over the objection of the Defendants and the Defendants contend it was not competent evidence because no proper foundation had been laid for the testimony.

Again the Defendants contend that the General Assembly has the right, under the police power, to determine the ownership, if any, the Plaintiff may have in a black bear and that the General Assembly had done so by enacting a law which limits compensation which can be paid to the owner thereof to $100.00. It is clear from the exhibits that the Defendants herein was prepared to pay the Plaintiff $100.00 to surrender possession of the black bear to the Defendant.

CONCLUSION

The Respondents respectfully request that the petition for a Writ of Certiorari be denied.

Respectfully submitted

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Millard R. Rich, Jr.
Deputy Attorney General

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CERTIFICATE OF SERVICE

I, Millard R. Rich, Jr., Deputy Attorney General of the State of North Carolina, Attorney for the Respondents herein, certify that on the 24th day of March, 1977, I served a copy of the foregoing Brief of Respondents In Opposition To Petition For Writ Of Certiorari on counsel for the Petitioner by depositing a copy of same in an envelope, postage prepaid, in the United States Mail, addressed as follows:

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APPENDIX A

APPENDIX A

NORTH CAROLINA WILDLIFE RESOURCES COMMISSION POLICY WITH RESPECT TO HOLDING BLACK BEARS IN CAPTIVITY UNDER CONDITIONS SIMULATING NATURAL HABITAT

WHEREAS, The provision of Chapter 56 of the Session Laws of 1975 prohibiting holding black bears in captivity do not apply to "black bears held without caging under conditions simulating a natural habitat, the development of which is in accord with plans and specifications developed by the holder and approved by the Wildlife Resources Commission"; and

WHEREAS, Persons in possession of black bears under existing permits on the effective date of said law may elect to retain possession thereof pending submission of such plans and specifications to the Wildlife Resources Commission, but must forfeit such bears without compensation in the event such plans and specifications are not approved; and

WHEREAS, In making such election, such persons should be apprised of the policy of the Wildlife Resources Commission with respect to the conditions it deems necessary to simulate "a natural habitat" for black bear within the meaning of the law;

NOW, THEREFORE, The North Carolina Wildlife Resources Commission in official session this 16th day of June, 1975, resolves that it shall be the policy of the Commission to approve plans and specifications for facilities to hold black bears without caging and under conditions simulating a natural habitat, provided:

(1) The method of confinement shall be a chain link fence, wall or moat; no chains or other tethers or electric shock may be used to hold black bears;

(2) The area of confinement is at least one acre in extent for the first two bears and an additional one-eighth acre for each additional bear and the bear or bears are free, under normal conditions, to move throughout such area;

(3) At least one-half of the area of confinement is wooded with living trees, shrubs and other perennial vegetation capable of providing shelter from sun and wind;

(4) The area of confinement contains a pool not less than 1½ feet deep and not less than 20 square feet in area;

(5) Provision is made for a den for each bear at least 5 x 5 x 4 feet in size to which the bear or bears may retire for rest, shelter from the elements, or respite from public observance;

(6) The area of confinement presents an over-all appearance of a natural habitat and affords protection of the bear or bears from harassment or annoyance;

(7) Provision is made for the maintenance of sanitary conditions;

(8) No condition or circumstance exists which is calculated to avoid, subvert, or defeat the purpose of the law; and

(9) The person submitting the plans and specifications demonstrates by satisfactory evidence that he owns or has long-term control of real property of suitable size and terrain to permit development of the facilities in accordance with such plans and specifications within 60 days after approval thereof as required by law.

IT IS FURTHER RESOLVED, That it shall be the policy of the Commission to disapprove any plans and specifications for facilities to hold black bear without caging and under conditions simulating a natural habitat when it appears that such plans and specifications do not conform with the foregoing requirements, or when it appears that the facilities when completed will not or do not conform with such plans and specifications.

APPENDIX B

APPENDIX B

June 27, 1975

Mr. Albert T. Cannady
Route 1, Box 452
Newport, North Carolina 28570

Dear Mr. Cannady:

According to Commission records you hold a permit which authorizes holding black bear in capitivity. The 1975 General Assembly has enacted a law prohibiting the caging of black bears in North Carolina after July 1, 1975, but providing that they may be held without caging under conditions simulating a natural habitat if approved by the Wildlife Resources Commission.

Two options are available under the provisions of the new law to persons holding bears under existing permits:

(1) The bear may be surrendered to the Wildlife Resources Commission immediately and the permittee will be compensated in the actual amount paid for the bear, not to exceed $100.00.

(2) The permittee may give immediate written notice to the Wildlife Resources Commission that detailed plans and specifications of facilities to hold the bear under conditions simulating natural habitat will be submitted for approval within thirty days. If the plans are not so submitted or are disapproved after submission, or if the facilities are not completed sixty days after the plans are approved, the bear must be forfeited without compensation.

For the guidance of those who may consider selecting the second option, the Wildlife Resources Commission has

adopted a policy with respect to what it deems to be the minimum standards for holding facilities simulating a natural habitat. A copy of this policy as well as a copy of the new law is enclosed for your information.

Please let us know your decision without delay.

Cordially and sincerely,

Clyde P. Patton

Enclosures: (1) Policy with Respect to Holding Black Bears in Captivity

(2) Chapter 56, Session Laws 1975

APPENDIX C

APPENDIX C

July 28, 1975

Mr. Albert T. Cannady
Route 1, Box 452
Newport, North Carolina 28570

Dear Mr. Cannady:

On June 27, 1975, we sent you a letter explaining the effect of Chapter 56 of the Session Laws of 1975 with respect to holding black bears in captivity.

Since you have not elected to pursue the alternative of providing approved facilities for holding black bear under conditions simulating a natural habitat, your permit to hold the bear is no longer valid and your continued possession thereof is a violation of law carrying substantial penalties.

Agents of the Wildlife Resources Commission will call on you in the near future for the purpose of retrieving the bear and delivering to you the compensation provided by law. Your cooperation will eliminate the necessary of instituting court proceedings.

Cordially and sincerely,

Clyde P. Patton

APPENDIX D

APPENDIX D

August 1, 1975

Mr. Clyde P. Patton
Executive Director
North Carolina Wildlife Resources Com.
Raleigh, North Carolina 27611

RE: Plans and specifications of facilities to hold Black Bears

Dear Mr. Patton:

Below you will find plans and specifications to hold a five-year old black bear (ursus Americanus) presently owned by me:

Plans:

1. Pen eight feet by twelve feet (8 X 12) with chain link fence on all sides and top of pen with a cement floor.

2. Den, five feet by five feet by four feet (5 X 5 X 4) located inside pen.

3. Five foot tub located inside pen.

4. Electric fan placed beside the pen blowing fresh cool air into the pen for the bear during the summer months.

5. Scratching pole in center of pen 6 inches in diameter and 4 feet high.

I would respectfully request that you consider these specifications and authorize me a permit to continue to keep my bear. Should you have any questions concerning this matter, please contact my attorney, Mr. Ernest C. Richardson, III, P. O. Box 1594, New Bern, NC 28560.

Yours very truly,

Albert Thomas Cannady

APPENDIX E

APPENDIX E

August 4, 1975

Mr. Albert T. Cannady
Route 1, Box 451
Newport, N.C. 28570

Dear M. Cannady:

The August 1, 1975 description of your facilities for holding the black bear now in your possession has been carefully considered.

Please be advised that your holding pen does not meet minimum standards for a natural habitat as required by Chapter 56, Session Laws 1975, and described in enclosure 1 to my letter of June 27, 1975.

Cordially and sincerely,

Clyde P. Patton